IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5299 OF 2005

M/s.Unimin India Limited .. Petitioner.

V/s.

Union of India & Others .. Respondents.

Mr.Vikram Nankani with Mr.Madhur Baya for the petitioner.

Ms.Soma Singh i/b. Dr.T.C. Kaushik for the respondents.

CORAM : R.M. LODHA &
J.P. DEVADHAR, JJ.

DATED : 13TH APRIL, 2006.

P.C. :

By this writ petition filed under Article 226 of the Constitution of India, the petitioner seeks to impugn the order dated 24th May, 2004 passed by the Commissioner, Customs & Central Excise, Daman and the orders dated 28th February, 2005, 15th June, 2005 and 20th July, 2005 passed by the Customs, Excise & Service Tax Appellate Tribunal (for short 'the Tribunal').

2. The petitioner was given show-cause notice under Sections 4, 11A, 11AB, 11AC of the Central Excise Act read with Rule 9(1), 100C, 100D, 100E, 100F, 100H, 173C, 173F, 173G(1) and 173G(3) of the Central Excise Rules, 1944 and provisions of Para

9.22 of the Handbook of Procedures 1997-2002 for demand and recovery of central excise duty amounting to Rs.3,30,47,399/- and for imposition of the penalty.

3. The petitioner responded to the show cause notice and submitted his explanation.

4. The Commissioner of Central Excise recorded evidence of Mr.J.J. Joshi and Mr.R.J. Pathak, investigating officers and upon consideration of the available evidence and material, by the order dated 24th May, 2004 inter-alia confirmed the demand of duty amounting to Rs.3,30,47,399/- under Section 11A(2) of the Central Excise Act, 1944 and also imposed penalty amounting to Rs.3,30,47,399/-.

5. Dissatisfied with the order of the Commissioner of Central Excise dated 24th May, 2004, the petitioner preferred appeal before the Tribunal and made an application for waiver of pre-deposit.

6. By the order dated 28th February, 2005, the Tribunal directed the petitioner to deposit Rs.80,00,000/- towards duty and Rs.20,00,000/- towards penalty within 12 weeks and report compliance on 9th June, 2005.

7. The petitioner made an application for review of order dated 28th February, 2005 on 1st June, 2005 and prayed for grant of unconditional waiver of of the duty and penalty amounts.

8. Vide its order dated 24th May, 2005, the Tribunal modified its earlier order dated 28th February, 2005 and directed the petitioner to pre-deposit a sum of Rs.60,00,000/- towards duty and further pre-deposit requirements were waived.

9. Then an application for rectification of application dated 15th June, 2005 was made by the petitioner.

10. The Tribunal by its order dated 20th July, 2005 found no merit in the application for rectification and dismissed the same by order dated 20th July, 2005.

11. This is how the petitioner has approached this Court in extra-ordinary jurisdiction.

12. We heard Mr.V.S. Nankani, counsel for the petitioner and Ms.Soma Singh, counsel for the revenue.

13. Mr.V.S. Nankani, counsel for the petitioner

strenuously urged that the order dated 24th May, 2004 passed by the Commissioner suffers from grave illegality and irregularity since the petitioner was not given reasonable opportunity of being heard before passing the order. He would submit that the Commissioner did not permit the petitioner to cross-examine few witnesses nor the petitioner was given an opportunity to argue the matter on merits after the evidence was closed. Counsel submitted that this aspect was brought to the notice of the Tribunal in support of the application for waiver of pre-deposit but this aspect has been altogether overlooked by the Tribunal. He also argued that no concession was made by the counsel for the petitioner that demand of duty in the sum of Rs.70,00,000/- will survive as recorded in the order dated 15th June, 2005.

14. There appears to be some confusion about the order dated 20th July, 2005. The counsel for the petitioner urged that in the order dated 20th July, 2005 the Tribunal recorded that no concession was made by the advocate; the contention of the counsel for revenue was that by the order passed on 20th July, 2005, the Tribunal rather held that there were no reasons for rectification of order dated 15th June, 2005, the original record and proceedings were called for.

15. We have gone through the hand written order dated 20th July, 2005 upon which strong reliance was placed by the counsel for the petitioner. The hand written order appears to be in the nature of Judge's notes. The order that was passed by the Tribunal in disposing of the application for modification of the order dated 15th June, 2005 is a type-written order dated 20th July, 2005 on file wherein the Tribunal recorded thus :

> "5. In the present application, an averment has been made, signed by the Chairman & Managing Director to the effect that
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> '..... And that the duty liability, if any, when correctly quantify would work out about Rs.77 Lakhs only.'
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> 6. In this view of the matter, considering concession of Rs.70.00 lakhs, as having not being urged in this application, cannot be accepted since the bench was not having any means to come to a quantification of admitted duty liability, if any, as well as in the present application made before us the quantum of such admitted liability, if any, is made out to be Rs.77.00 lakhs by the Chairman & managing Director, which is not must off the mark of the amounts which must have been mentioned by the Ld.Advocate for the applicants.
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> 7. We find no reasons in the present application filed to induce us to order a rectification and/or modification of the order of pre deposit of Rs.60.00 lakhs. However, we would extend the date of compliance to be reported on 16.8.2005".

16. It would be, thus, seen that the Tribunal found no justification in the grievance raised by the

petitioner in respect of the order dated 15th June, 2005.

17. As regards challenge to the order dated 24th May, 2004 passed by the Commissioner, Central Excise, suffice it to say that the petitioner has already filed appeal before the Tribunal wherein the order of pre-deposit came to be passed. We find no justification in permitting the petitioner to challenge the legality and correctness of order dated 24th May, 2004 directly before this Court in this fact situation.

18. Now adverting to the challenge to the orders of the Tribunal, the contention of the counsel is that the Commissioner passed the order in violation of the principles of natural justice and this contention though raised before the Tribunal, the Tribunal did not specifically deal with the contention in the order dated 28th February, 2005. It is true that the Tribunal has not specifically referred to this aspect in its order dated 28th February, 2005. However, we ourselves considered this aspect for limited purpose of pre-deposit. We may indicate that we do not find any such error which would vitiate the order of pre-deposit made by the Tribunal. On behalf of the revenue, two investigating officers were examined and ample

opportunity was given to the petitioner to cross-examine them and in fact on behalf of the petitioner these two investigating officers were cross-examined. The prayer made by the petitioner for cross-examination of its own officers was wholly misconceived and fallacious and, therefore, the Commissioner cannot be said to have erred in rejecting the said prayer. The impugned order came to be passed after giving show-cause notice to the petitioner and in response thereto the petitioner did reply. For the present purpose, therefore, it cannot be said that there was any patent violation of principles of natural justice. Ordinarily, we would not have gone into this aspect as the petitioner had already filed appeal before the Tribunal aggrieved by the order dated 24th May, 2004 but since the counsel vehemently raised this issue before us, our observation became necessary.

19. As a matter of fact, the Tribunal had been quiet considerate in permitting the petitioner to deposit only Rs.60,00,000/- by way of pre-deposit where the duty demand against the petitioner amounted to Rs.3,30,47,399/- and the penalty also in the same sum. In its initial order dated 28th February, 2005, the Tribunal directed the petitioner to deposit Rs.80,00,000/- towards the duty and Rs.20,00,000/- towards penalty but by the subsequent order dated

15th June, 2005, the Tribunal reduced the pre-deposit to Rs.60,00,000/- and waived deposit of remaining amount of duty and penalty. The Tribunal has negatived the stand of the petitioner that no averment was made that the duty liability, if any, correctly quantified would work out to Rs.77,00,000/- only. The averment made in the application signed by the Chairman and Managing Director of the petitioner - company has been recorded by the Tribunal as it is in para 5 of the order dated 20th July, 2005. All in all, the Tribunal had been very considerate in permitting the petitioner to deposit Rs.60,00,000/- only by way of pre-deposit. No interference is called for in such lenient order.

20. The writ petition does not deserve to be admitted and is dismissed in limine.

21. If within a period of three weeks from today, the petitioner deposits a sum of Rs.60,00,000/- as per the order dated 15th June, 2005, the Tribunal shall hear the appeal on merits and if the said appeal has been dismissed for want of compliance of order dated 15th June, 2005, the same shall stand restored to file.

22. The record and proceedings shall be transmitted back to the Tribunal without any delay.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)